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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

December 3, 1999

VIA HAND DELIVERY

Claudia Pabo
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Application by New York Telephone Company (d/b/a Bell Atlantic-New York), Bell Atlantic Communications, Inc., NYNEX Long Distance Company, and Bell Atlantic Global Networks, Inc. for Authorization To Provide In-Region, InterLATA Services in New York, CC Docket No. 99-295

Written *Ex Parte* Presentation by Net2000 Communications Services, Inc.

Dear Ms. Pabo:

On behalf of Net2000 Communications Services, Inc. ("Net2000"), this letter provides additional information to supplement the Net2000 oral *ex parte* presentation made on November 2, 1999. As you may recall, during that meeting, Peter Callowhill, Jason Karp and Anthony Hansel, all of Net2000, and the undersigned, indicated concern regarding the excessive termination penalties levied by Bell Atlantic-New York ("BA-NY") on customers who have entered into long-term service contracts and the need to impose a "fresh-look" period to permit a customer to terminate long-term BA-NY contracts without penalty, or such portion of the penalty deemed excessive, coincident with any grant of Section 271 authority to BA-NY.

As Net2000 previously indicated in its oral *ex parte* presentation and comments filed in the above-referenced proceeding, BA-NY has seized upon the effective absence of real widespread competition in New York to exercise their monopoly power and bind customers in long-term contracts. As competition now begins to develop in New York and customers seek to

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take advantage of competitive service offerings, they find that they are locked-in to BA-NY service contracts with excessive termination penalties.¹

The Federal Communications Commission ("Commission" or "FCC") has recognized the adverse competitive consequences of excessive incumbent local exchange carrier ("ILEC") contract termination penalties. In rejecting BellSouth's initial application for in-region, interLATA authority in South Carolina, the Commission held that it "would want to review such fees and request[ed] that BOCs provide information justifying the level of cancellation or transfer fees in future applications."² The Commission noted that:

Because, depending on the nature of these fees, their imposition creates additional costs for a CSA [customer-specific arrangement] customer that seeks service from a reseller, they may have the effect of insulating portions of the market from competition through resale.³

It is a well-settled principle of law that a regulatory agency may intervene to abrogate unlawful contract provisions and excessive termination penalties.⁴ In several cases, the FCC has exercised this power to abrogate private contracts and establish a fresh-look period in which customers could choose from competitive alternatives without penalty. For instance, in the context of 800 number portability, the FCC determined that AT&T had the ability to leverage market power in 800 or inbound services in order to gain an advantage in the provision of other services. Accordingly, the FCC imposed certain 800 and inbound service bundling restrictions, in addition to a fresh-look requirement for grandfathered packages requiring AT&T to permit customers to terminate these bundled packages without termination liability at the time 800

¹ See *Joint Comments of e.spire Communications, Inc. and Net2000 Communications Services, Inc.*, at 3-10, CC Docket No. 99-295 (filed Oct. 19, 1999); *Comments of Allegiance Telecom, Inc.* at 18-20; *Comments of ALTS* at 66; *Comments of KMC Telecom, Inc.* at 13; *Comments of Telecommunications Resellers Association* at 23-25.

² See *Application of BellSouth Corporation et al., Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In Region InterLATA Services in South Carolina*, FCC 97-418, CC Docket No. 97-208 at ¶ 222 (rel. Dec. 24, 1997).

³ *Id.*

⁴ The FCC may declare an interstate common carrier practice unlawful upon a finding that it is "unjust, unreasonable, unduly discriminatory or preferential." See *Western Union Telegraph Co. v. FCC*, 815 F.2d 1495, 1501 n.2 (D.C. Cir. 1987). A regulatory agency has the power to modify a private contract or quasi-contractual public tariff provision within its jurisdiction when necessary in the public interest. See *id.*; see also *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348, 353-55, 76 S.Ct. 368 (1956); *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 344, 76 S.Ct. 373 (1956); *Cable & Wireless P.L.C. v. FCC*, 166 F.3d 1224, 1232 (D.C. Cir. 1999).

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numbers became portable.⁵ As another example, to free up major airline carrier-customers that had entered into long-term contracts with GTE's then-incumbent monopoly over air-to-ground wireless telephone service, the FCC imposed a fresh-look period to allow the airlines to choose from newly licensed air-to-ground wireless phone service providers without incurring penalty from terminating their existing contracts with GTE. In the *GTE Airfone* case, the FCC stated:

*We find it contrary to the public interest for GTE to restrict competition by binding airlines to exclusive contracts . . . or to require airlines to pay premature contract-termination penalties. Further, we believe the quantity of aircraft equipped by GTE since [the agency's decision to license competing providers] is substantial. To allow competition to develop fully in the air-ground market, airlines need to be able to terminate, at their option and without penalty, contracts entered into with GTE . . . and regardless of the contract termination provisions.*⁶

Furthermore, in the wake of the imposition of Section 251 interconnection obligations on the ILECs as part of the Telecommunications Act of 1996, the FCC granted fresh-look relief to commercial mobile radio service ("CMRS") carriers to be relieved without penalty from unlawful reciprocal compensation provisions in existing ILEC-to-mobile interconnection agreements.⁷ Finally, the FCC has imposed similar requirements to protect emerging competition in the interstate competitive exchange access service market.⁸

⁵ *Competition in the Interstate Interexchange Marketplace*, CC Docket No. 90-132, Memorandum Opinion and Order on Reconsideration, 7 FCC Rcd 2677, 2681-82 (1992) ("fresh look" in context of 800 bundling with interexchange offerings).

⁶ *Amendment of the Commission's Rules Relative to Allocation of the 849-851/894-896 MHz Bands*, 6 FCC Rcd 4582, 4583-84 (1991) ("*GTE Airfone*") (emphasis added).

⁷ *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, CC Docket No. 96-68, 4 Comm. Reg. (P&F) 1, 11 FCC Rcd 15499, 61 Fed. Reg. 45475 at n.2636, *aff'd in part and reversed on other grounds*, *Iowa Util. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *affirmed in part, reversed in part, and remanded sub nom. rev'd*, *AT&T Corp. v. Iowa Util. Bd.*, 119 S Ct 721 (1999).

⁸ *See Expanded Interconnection with Local Telephone Company Facilities*, 7 FCC Rcd 7369, 7463-7465 (1992), recon., 8 FCC Rcd 7341, 7342-7359 (1993) (fresh look to enable customers to take advantage of new competitive opportunities under special access expanded interconnection), *vacated on other grounds and remanded for further proceedings sub nom. Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441 [75 RR 2d 487] (1994).

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The contract termination penalties assessed by BA-NY are particularly troubling and, accordingly, must be justified by BA-NY. Net2000 submits that at this point in time, BA-NY has failed to provide justification for its excessive termination penalties. In its Section 271 Application, BA-NY noted that:

if a customer elects to terminate its service with Bell Atlantic, whether to switch to a reseller or for some other reason, it may be subject to reasonable and non-discriminatory termination liabilities to the extent they were part of the original terms of the CSA agreed to by the customer.⁹

To the contrary, BA-NY's termination fees are excessive and unreasonable. BA-NY has seized upon the effective absence of real widespread competition in New York to exercise its monopoly power and bind customers into long-term contracts with excessive termination penalties. As noted by the U.S. Supreme Court, the lock-in effect is a well-established antitrust concept recognizing that consumers can be denied the benefits of competition through operation of long-term contracts.¹⁰ Indeed, only firms with market power can systematically require excessive termination penalties. Customers will not allow new local service market entrants such as Net2000 to impose the excessive termination liability that BA-NY continues to impose as a result of its monopoly power.

What is particularly troubling about BA-NY's Application is the blatant omission and misrepresentation regarding the excessive termination penalties it imposes on its customers. In its Section 271 Application and reply comments, BA-NY only specifically addressed its termination penalties for its Centrex services. Specifically, in its Application BA-NY described that its "termination liability 'true up' the Centrex rates the customer actually paid to the rates the customer should have paid for the period in time the customer received the Centrex services."¹¹ BA-NY used the following illustration as an example:

For example, if a customer terminates a five-year CSA for Centrex after two years, the termination liability will be the difference between what the customer would have paid under a two-year CSA and what the customer actually paid under the five-year CSA.¹²

⁹ Bell Atlantic 271 Application, 46.

¹⁰ *United States v. General Dynamics Corp.*, 415 U.S. 486, 501 (1974) (explaining that the ability of market participants to wield competitive influence in the marketplace is reduced or eliminated by their participation in long-term requirements contracts.)

¹¹ *See Joint Declaration of Paul A. Lacouture and Arthur J. Troy*, ¶¶ 268-270.

¹² Bell Atlantic 271 Application, 46.

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However, as Net2000 previously indicated in its oral *ex parte* presentation and its comments, this is not the formula BA-NY typically uses in calculating termination penalties for other widely offered services. For example, BA-NY's current Flexpath Digital PBX Service offering is typically offered to customers as a "take or pay" contract, which means that a customer will be charged for the entire service regardless of whether or not they actually use the service. Flexpath is essentially a T-1 line service for those customers who utilize PBX systems. As noted in our oral *ex parte* presentation, such customers make up most of our base and our, as well as other competitors', target markets. Contrary to BA-NY's assertion in its reply comments that "most of the contracts about which commenters complain involve Centrex service," most BA-NY customers who wish to choose Net2000 as their service provider already have switching equipment located on their premises, and are therefore interested in T-1 service – not Centrex.¹³ These customers may not realistically terminate their contract with BA-NY to move to a competitor since, as mentioned above, they will be charged for the entire service regardless of whether or not they actually use the service from BA-NY. BA-NY selectively omitted from their application the discussion of the excessive termination penalties associated with these customers. Rather, BA-NY states that its "termination liabilities are pro-competitive, as they preserve the incentives necessary for Bell Atlantic to keep offering services to customers at low rates, and enable customers to switch carriers without the usual consequences involved in breaking a freely negotiated contract."¹⁴ It appears that BA-NY felt it could hide the issue by telling only half of the story.

As the Commission recognized in a previous Section 271 proceeding, "the ability of incumbent LECs to impose resale restrictions and conditions is likely to be evidence of market power and may reflect an attempt by incumbent LECs to preserve their market position."¹⁵ Further, as confirmed by the Commission's long history of exercising its power to abrogate unlawful contracts and establish fresh-look periods, this issue goes beyond resale, and impacts facilities-based carriers as well as wireless carriers.

Until such time as BA-NY makes a showing that the New York market is fully and irreversibly open to local competition, the Commission should deny the application at the very least and delay grant of Section 271 authority until it has reviewed Bell Atlantic's termination liability practices and put remedies in place. As troubling as the termination penalties themselves, however, is BA-NY's blatant attempt to misdirect the Commission regarding these excessive penalties. At a minimum, we ask the Commission to further investigate BA-NY's representations in this regard. As a final protective measure, and to ensure a level playing field, Net2000 respectfully submits that the Commission should nevertheless

¹³ Reply Comments of Bell Atlantic-New York, 30.

¹⁴ Reply Comments of Bell Atlantic-New York, 30.

¹⁵ See *Application by BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Louisiana*, FCC 98-17, CC Docket No. 97-231 at ¶ 68 (rel. Feb. 4, 1998).

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condition any future grant of Section 271 authority on the Commission's imposition of a "fresh-look" period to permit a customer to terminate long-term BA-NY contracts without penalty, or such portion of the penalty deemed excessive, in order to choose a competitive service provider.

If you have any questions in connection with this letter, please do not hesitate to contact us. Thank you for your time and consideration on this matter. Notice of this written *ex parte* presentation will be filed today with the Commission Secretary.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ross A. Buntrock". The signature is stylized with a large, looped "R" and "B".

Ross A. Buntrock

cc: Larry Strickling
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